

**STATE WATER RESOURCES CONTROL BOARD**

**DIVISION OF WATER RIGHTS**

**DIVISION DECISION 2003-0001**

**APPLICATIONS 29498, 29724 AND 29725  
WILLIAM I. MORGAN, JR.**

**UNNAMED STREAMS TRIBUTARY TO MILLER CANYON  
PUTAH CREEK INTER DAM REACH BETWEEN  
MONTICELLO DAM AND SOLANO DIVERSION DAM**

**AND**

**APPLICATION 31054  
KURT M. & IRIA C. BALASEK**

**UNNAMED STREAMS TRIBUTARY TO  
PUTAH CREEK INTER DAM REACH BETWEEN  
MONTICELLO DAM AND SOLANO DIVERSION DAM  
SOLANO AND YOLO COUNTIES**

**Date: January 13, 2003**

## TABLE OF CONTENTS

1.0	INTRODUCTION/ OVERVIEW .....	1
1.1	Applications 29498, 29724 and 29725 of William I. Morgan Jr. ....	1
1.2	Application 31054 of Kurt and Iria Balasek .....	2
2.0	NOTICE/PROTEST .....	3
2.1	Morgan Applications .....	3
2.2	Balasek Application .....	4
3.0	ANALYSIS OF WATER AVAILABILITY .....	6
3.1	Cumulative Effect of Proposed Diversions.....	8
3.2	Conclusions.....	9
4.0	RESOLUTION OF OUTSTANDING PROTESTS .....	9
4.1	Morgan Applications .....	10
4.2	Balasek Application .....	11
4.3	Outcome of protest resolution.....	11
5.0	COMPLIANCE WITH CEQA .....	13
6.0	SUMMARY AND CONCLUSIONS .....	14
	ORDER.....	14

**DIVISION OF WATER RIGHTS  
DIVISION DECISION 02-XX  
PUTAH CREEK DRAINAGE BASIN BETWEEN MONTICELLO DAM  
AND SOLANO DIVERSION DAM  
APPLICATIONS 29498, 29724, 29725 AND 31054**

1.0 INTRODUCTION/ OVERVIEW

This matter comes before the State Water Resources Control Board (SWRCB), Division of Water Rights (Division), pursuant to Water Code sections 1345-1348, on water right Applications 29498, 29724, and 29725, filed by Mr. William I. Morgan, Jr., and Application 30154, filed by Kurt M. and Iria C. Balasek. William Morgan requests the right to divert to storage a total of 30 acre-feet per annum (afa) from three unnamed streams tributary to Miller Canyon thence Putah Creek for the purpose of stockwatering and wildlife enhancement. Kurt M. and Iria C. Balasek request the right to divert to storage a total of 45 afa from two unnamed streams tributary to Putah Creek for the purposes of irrigation, fish and wildlife enhancement, recreation, stock watering, and fire protection. Protests were filed against each of the applications. The Division conducted a field investigation on water right Applications 29498, 29724, 29725 and a separate field investigation on Application 31054. Upon review of the protestants' claims and all available information, including an evaluation of the hydrology of Putah Creek, the beneficial uses of the proposed water diversion and the potential impacts on prior rights and public trust resources from the proposed action, the Division concludes that water right permits should be issued, subject to the terms contained in the attached permits.

The Division has determined that while water is available for these appropriations as specified in this Decision, there is not a reliable source of water for future projects between Monticello Dam and the Solano Diversion Dam from April 1 through December 15 in wet and normal years.<sup>1</sup> Additionally, in dry water years water is not available year-round.

1.1 Applications 29498, 29724 and 29725 of William I. Morgan Jr.

William Morgan proposes to construct three reservoirs, one under each Application 29498, 29724 and 29725. All of the proposed reservoirs will be located on separate unnamed streams tributary to Miller Canyon. Each reservoir will consist of a 25-foot high dam forming a 10 acre-foot (ac-ft) capacity onstream reservoir with a surface area of one acre. Water will be collected to storage from November 1 through April 30 and will be used for livestock and wildlife enhancement. The project is located within the watershed of Miller Canyon, approximately 8 miles west of the community of Allendale and 4 miles northeast of Bucktown.

The Division distributed a notice of the applications and received four protests against the projects. The Division has reviewed the environmental and prior rights claims presented by the

---

<sup>1</sup> Wet, normal and dry years are defined as the 25, 50, and 75 percent hydrologies, respectively.

protestants, evaluated the hydrology and water availability of the inter dam reach of Putah Creek, and analyzed the mandated releases at Solano Diversion Dam, required to protect fishery resources in Lower Putah Creek. In addition, under the provisions of the California Environmental Quality Act (CEQA), the Division has prepared and circulated an Initial Study and Draft Negative Declaration, which addressed the project's potential environmental impacts, including but not limited to those alleged by the protestants. The Division determined that water right permits should be issued for Applications 29498, 29724, and 29725, which would authorize the storage of 30 ac-ft of water per year for the purpose of stock watering and wildlife enhancement, subject to the conditions contained in the attached permits, including those specified within the CEQA document.

## 1.2 Application 31054 of Kurt and Iria Balasek

Kurt and Iria Balasek originally requested authorization to divert 45 afa to storage from October 15 to July 15 in reservoirs formed behind three small earthen dams, located on two separate unnamed streams tributary to Putah Creek. The Balaseks have since reduced the season of diversion requested to January 1 to April 30. Reservoir No. 1 (point of diversion No. 1) is located on one Unnamed Stream while Reservoirs 2 and 3 (points of diversion No. 2 and No. 3) are on a separate Unnamed Stream. Point of diversion No.1 is also a point of rediversion from Reservoir No. 3. Reservoir No. 1 will be formed behind a dam approximately 25 feet in height, 150 feet in length, and have storage capacity of approximately 6.5 ac-ft. Reservoir No. 2 will be formed behind an earth fill dam approximately 25 feet in height, 125 feet in length, and have storage capacity of approximately 12 ac-ft. Reservoir No. 3 will be formed behind an earth fill dam approximately 25 feet in height, 125 feet in length, and have storage capacity of approximately 14 ac-ft. Reservoir No. 3 is also a point of rediversion for water originally stored in Reservoir No. 2. Although the total storage capacity is 32.5 ac-ft, the applicants intend to refill the reservoirs as water is used during the diversion season up to a total of 45 ac-ft. Water would be collected to storage and used for irrigation, fish and wildlife enhancement, recreation, stock watering, and fire protection. The project site is located in Solano County approximately 4 miles southwest of the town of Winters, in Section 35, Township 8N, Range 2W, MDB&M.

The Division distributed a notice of the application and received two protests against the project. The Division has reviewed the environmental and prior rights claims presented by the protestants, evaluated the hydrology and water availability of the inter dam reach of Putah Creek, and analyzed the mandated releases at Solano Diversion Dam, required to protect fishery resources in Lower Putah Creek. In addition, under the provisions of CEQA, the Division has prepared and circulated an Initial Study and Draft Negative Declaration, which addressed the project's potential environmental impacts, including but not limited to those addressed by the protestants. The Division determined that a water right permit should be issued for Application 31054 which would authorize the storage of 45 ac-ft of water per year, subject to the conditions contained in the attached permits, including those specified within the CEQA document.

## 2.0 NOTICE/PROTEST

### 2.1 Morgan Applications

On December 8, 1989, the Division issued a notice of Application 29498 to interested parties in accordance with sections 1300 and 1301 of the Water Code and received one protest. On February 15, 1991, the Division issued a notice of Applications 29724 and 29725 in accordance with sections 1300 and 1301 of the Water Code and received four protests for each application. The protestants were a group of Mr. Morgan's neighbors led by Ms. Barbara Comfort, Yolo County Flood Control and Water Conservation District, Solano County Water Agency (SCWA) and Solano County Orderly Growth Committee (SCOGC). The applications were protested on the basis of vested rights and environmental concerns.

The Division conducted a field investigation on August 20, 1992, in accordance with sections 1345 through 1348 of the Water Code. William Morgan, Jeanne Zolezzi, Christy Barton, Traci Dennis, Barbara Comfort, Steve Chainey, Sannie Osborne, Mike Mainz and William Van Dyck met at the entrance to the applicant's property. The Division provided an explanation of the field procedure, followed by a summary of the applications and protests. The field investigation included an on-site inspection of the proposed reservoirs. A memo dated October 22, 1992 to Murt K. Lininger, Program Manager of the Application and Hearing Section, from William Van Dyck provides a detailed description of the investigation and is located in file A029725. The protests were not resolved at the field investigation and the Staff Analysis/Division Decision was held in abeyance pending subsequent litigation, *Putah Creek Council v. Solano Irrigation District et al.* (Super. Ct. Sacramento County, 1996, No. 515766). On April 5, 1996, the court rendered a judgement that included a new release/bypass schedule for Solano Diversion Dam. The parties appealed that judgment and ultimately reached a settlement agreement entered into on May 23, 2000. Exhibit "A" of that agreement and the related Amended Judgment contains the Solano Project Releases and Instream Flows for Lower Putah Creek and is referred to in this Decision as the "Judgment."

#### 2.1.1 Barbara Comfort, et. al.

On February 21, 1990 and April 29, 1991, several neighbors with property located downstream of the Morgan projects submitted collective protests based on injury to vested rights and environmental concerns. Ms. Barbara Comfort was designated as the authorized representative of the collective protestants. Division staff prepared a water availability analysis dated September 2001 for the drainage basin between Monticello Dam and Solano Diversion Dam incorporating newly mandated bypass flows. The Division sent a letter dated September 25, 2001 to the applicant and protestants transmitting the water availability analysis and proposing permit terms to resolve the protests based on injury to prior rights. The copy sent to Ms. Barbara Comfort was returned to our office stating that the forwarding address order had expired. The Division sent a subsequent letter on November 8, 2001 to the 26 neighbors listed on the collective protest informing the protestants that the Division would dismiss their protests unless they responded by December 8, 2001. No response was received. Accordingly, these protests are dismissed.

### 2.1.2 Yolo County Flood Control And Water Conservation District

Yolo County Flood Control and Water Conservation District (YCFCWCD) submitted protests against Applications 29724 and 29725 on March 14, 1991 based on environmental concerns for fish and wildlife in lower Putah Creek. The Division issued a Notice of Proposed Negative Declaration to on June 17, 2002, and sent a copy to YCFCWCD. The Division sent a letter to YCFCWCD on August 23, 2002, noting that it had not commented on the Proposed Negative Declaration, asking it to inform the Division by September 7, 2002, of any remaining environmental concerns, and informing it that the Division would dismiss the protest if YCFCWCD failed to respond. No response was received. Accordingly, this protest is dismissed.

### 2.1.3 SCWA

SCWA submitted protests against Applications 29724 and 29725 on March 20, 1991 based on injury to vested rights, public trust, and environmental considerations. Negotiations between the applicant and SCWA resulted in SCWA agreeing to withdraw its protest upon the following conditions:

1. Permit Terms 43AP, 90 and T are included in any permit issued; and
2. The State Water Resources Control Board staff in the Division Decision granting said applications makes a determination that Putah Creek from the Solano Diversion Dam upstream to Monticello Dam is fully appropriated.

The status of SCWA's protest is discussed in section 4.0 of this document.

### 2.1.4 Solano County Orderly Growth Committee

SCOGC submitted protests against Applications 29724 and 29725 on March 29, 1991 based on concerns for native rainbow trout populations in Miller Creek and diminishing groundwater recharge to downstream properties. The Division sent a letter to SCOGC on August 23, 2002 inquiring whether its environmental concerns were resolved by proposed mitigation measures and informing it that the Division would dismiss its protest unless a response was received by the Division by September 7, 2002. The Post Office was unable to forward the letter and returned it to the Division. SCOGC did not notify the Division of a forwarding address, and therefore this protest is dismissed.

## 2.2 Balasek Application

On July 14, 2000, the Division issued a notice of Application 31054 to interested parties in accordance with Water Code sections 1300 and 1301. Ms. Emily Amy and the SCWA submitted protests against the proposed project.

On October 2, 2002, the Division conducted a field investigation in accordance with sections 1345 through 1348 of the Water Code. Kurt Balasek, Jeanne Zolezzi, David Okita, Lewis Moeller, Kathy Bare, Diane Lawson, Samantha Olson and Jane Farwell met at the barn on the applicant's property. The Division provided an explanation of the field procedure followed by a summary of the application and protest by the parties. The field investigation included a description of the project sites from a hill overlooking the areas of the proposed reservoirs. A memo dated October 3, 2002 from Kathryn Bare to Vicky Whitney, Program Manager; Bay Delta/Hearing Section provides a detailed description of the investigation and is available in file A031054.

#### 2.2.1 Ms. Emily Amy

On August 14, 2000, Ms. Amy filed a protest against Application 31054 expressing concern over the amount of water applied for in the application and the introduction of non-native fish to native water habitat. By letter dated September 5, 2000, Mr. Balasek responded to the concerns raised in Ms. Amy's protest. By letter dated Nov. 8, 2000, Division staff requested that Ms. Amy submit additional information if she desired to maintain her protest. Ms. Amy did not respond and the Division dismissed her protest on June 4, 2002.

#### 2.2.2 SCWA

SCWA submitted a protest dated August 18, 2000 against Application 30154 based on injury to vested rights, public trust, and environmental considerations. SCWA is required to release water from Solano Diversion Dam to lower Putah Creek to satisfy instream flow and other requirements pursuant to an amended judgment issued by the Superior Court for the Putah Creek Water Cases and settlement agreement (Judgment). SCWA submits that natural and abandoned flow is inadequate during the November 1 to April 30 period in dry water year types and in November and December of normal water year types.

The Solano County Water Agency notified the Division that it would withdraw its protest to the subject application under the following conditions:

1. The SWRCB includes in any permit issued on Application 31054, Standard Permit Terms 43, 90, and T.
2. The State Water Resources Control Board staff in the Division Decision granting the application, makes a determination that Putah Creek from the Solano Diversion Dam upstream to Monticello Dam is fully appropriated.

The status of SCWA's protest is discussed in section 4.0 of this document.

### 3.0 ANALYSIS OF WATER AVAILABILITY

In acting upon applications to appropriate water, the Division must find that unappropriated water is available to supply the applicant. (Wat. Code § 1375, subd. (d).) The determination must take into consideration the quantity of water needed to satisfy downstream prior rights and to protect public trust resources, including recreation, the preservation and enhancement of fish and wildlife, and other beneficial uses. The Division has conducted a water availability analysis for Applications 29498, 29724, 29725 and 31054 that evaluates the instream flows needed to protect prior rights and public trust resources, in accordance with sections 1243, 1243.5 and 1375 (d) of the Water Code. A memo dated September 2001 signed by Kathryn Bare provides a report of that analysis and is located in files A029725 and A031054.

In the water availability analysis, the Division evaluated the hydrology of the watershed above the project site for wet, normal, and dry water years. In order to determine the impact of these projects on the SCWA, the Division evaluated the drainage basin below Monticello Dam and above the Solano Diversion Dam to determine if water is available to satisfy senior water rights and fishery flows required for Lower Putah Creek.

The Division used the rational runoff method and proration of area method to evaluate the total quantity of water available in the watershed above the project site. Staff used forty-eight years of rainfall data from the Winters Rain Gage to estimate runoff using the rational method. Staff used stream flow data from the USGS gage station on Pleasants Creek for the Proration of Area method evaluation. The stream flow data was adjusted to account for existing diversions upstream of the gage. Table 1 below provides an estimate of the water available at each diversion site by water year type as calculated using each method.



**Table 1 – Unimpaired Runoff**

Unimpaired Runoff above Project A029498			
A029498		Runoff (afa)	
Water Year	Tributary Area	Rational Method	Proration of Areas
Wet	167 acres	210	208
Normal	167 acres	156	104
Dry	167 acres	105	66

Unimpaired Runoff above Project A029724			
A029724		Runoff (afa)	
Water Year	Tributary Area	Rational Method	Proration of Areas
Wet	607 acres	765	758
Normal	607 acres	568	378
Dry	607 acres	383	239

Unimpaired Runoff above Project A029725			
A029725		Runoff (afa)	
Water Year	Tributary Area	Rational Method	Proration of Areas
Wet	184 acres	232	229
Normal	184 acres	172	115
Dry	184 acres	116	72

Unimpaired Runoff above Project A031054			
A031054		Runoff (afa)	
Water Year	Tributary Area	Rational Method	Proration of Areas
Wet	210 acres	264	262
Normal	210 acres	196	131
Dry	210 acres	132	83

Applications 29498, 29724 and 29725 request 10 afa each. Application 31054 requests a total of 45 ac-ft. As indicated in Table 1, the watershed above each of the proposed projects produces more runoff than the applicants seek to appropriate at that location.

### 3.1 Cumulative Effect of Proposed Diversions

To estimate the cumulative effect of the proposed diversions, the Division used forty-six years of rainfall data from the Winters Rain gage to calculate the amount of unimpaired runoff (**Q**) from the watershed by water year type; wet, normal and dry. The equation  $Q = CIA$  was used to calculate the runoff.

Where **C** equals 0.52

**I** equals inches of rainfall from the Winters Rain gage data that are divided by 12 to convert to feet

**A** equals the area of the watershed or 24,500 acres.

Next, water available for appropriation (**W**) was calculated using the equation

$$W = Q - S - F.$$

Where **Q** equals the unimpaired runoff from the watershed

**S** equals the amount of water authorized for diversion by senior water right holders and the amount of water sought by Morgan and Balasek.

**F** equals the in stream flow requirements<sup>2</sup>

The quantities of water necessary to fully satisfy senior water rights and instream requirements are shown in Table 2.

**Table 2. Monthly Values of Senior Water Rights and Instream Flow Requirements**

	(S) Senior water Rights (af)	(F) In stream flow Requirements (af)
October	41	1228
November	87	1485
December	97	1535
January	97	1535
February	97	982
March	97	1596
April	99	2732
May	111	2639
June	44	2554
July	44	2639
August	41	2087
September	41	1188

Finally, we calculated the frequency with which water is available for appropriation during each month for each water year type (Table 3).

<sup>2</sup> From page 1, paragraph 1 of Exhibit A of the Amended Judgement in the Putah Creek Water Cases. This Judgement specifies instream flow conditions for lower Putah Creek and requires that those conditions be met by releases from the Solano Project operated by SCWA and the Solano Irrigation District.

**Table 3. Frequency of Water Availability By Water Year Type**

	Wet	Normal	Dry
October	100%	0%	0%
November	100%	68%	0%
December	100%	100%	0%
January	100%	100%	17%
February	100%	91%	0%
March	100%	77%	0%
April	46%	0%	0%
May	0%	0%	0%
June	0%	0%	0%
July	0%	0%	0%
August	0%	0%	0%
September	23%	0%	0%

### 3.2 Conclusions

Based on this water availability analysis, we conclude that water is available for appropriation by Morgan and Balasek during the seasons they request in most months of wet year types and during some months of normal year types. Water is not available during dry year types.

### 4.0 RESOLUTION OF OUTSTANDING PROTESTS

SCWA is the only party with a protest pending against each of the applications, based on injury to prior rights. SCWA maintains that no water is available for appropriation from November 1 to April 30 in dry years, and in November and December in normal years. Through negotiations and an agreement to include certain terms in the permit, it appears that the only outstanding issue is the Division staff's recommendation to include Lower Putah Creek on the Fully Appropriated Streams declaration year-round.

On November 8, 2001, Division staff met with the Mr. Morgan, Mr. Balasek and representatives of SCWA to try to resolve the prior rights protest and to gather any additional information relative to the protest. SCWA submitted historical water release data from Solano Diversion Dam to Lower Putah Creek. Diversion Dam release records indicate that in dry years, virtually all of the water released to Lower Putah Creek would have been required to satisfy the Judgement. In normal years, release records indicate that during the rainy season, there are only a few days each month when the release was greater than the minimum required by the Judgement.

SCWA also provided information that indicated that there is rarely any water to divert prior to December 15, even in wet years. Solano Diversion Dam release data shows that there were only a few instances since 1970 when the November release was greater than the minimum required. More specifically, in the last 31 years there have only been a total of 39 November days when the Solano Diversion Dam release was greater than the minimum required, or roughly one

November day per year. Release records also indicate that since 1985 there have been no November days when the Diversion Dam release was greater than the minimum required. Similarly, over the last 31 years there have only been 26 December days (between December 1 and December 15) when the Solano Diversion Dam release was greater than the minimum required.

Following the meeting, the Balasek's agreed to amend their application to limit the diversion season to the period from January 1 through April 30. The Balasek's have agreed to accept the risk of short supply in dry periods, and a special permit term ensures that SCWA will not be injured. The November 1 through April 30 diversion season proposed by Mr. Morgan is appropriate because of the location of the reservoirs and because the contemplated beneficial uses may be interrupted in dry periods. Because of these reasons, SCWA did not request that Mr. Morgan amend his application to further limit his diversion season.

#### 4.1 Morgan Applications

Mr. Morgan's reservoirs will be built at the top of the watershed. Any releases from the reservoirs will be inconsequential to the volume of lower Putah Creek because most of the runoff that is produced in the watershed flows into the channel below Mr. Morgan's projects. The proposed beneficial uses for Mr. Morgan's applications include stock watering and wildlife enhancement. Both uses can tolerate an interrupted water supply. The reservoirs will be located within approximately 2500 acres of rangeland. The animals have a chance to disperse and locate to other man-made and natural sources of water in dry periods. Accordingly, his diversion season will remain November 1 until April 30.

Mr. Morgan's permits will include Standard Permit terms 43AP, 90, J and T. Permit term 43AP directs the permittee to install an outlet pipe at the bottom of the dam in onstream reservoirs that impound more than 10 ac-fe of water in critical watersheds such as Putah Creek.<sup>3</sup> Term J states that no construction shall commence and no water shall be stored where other federal, state or local agency approval is required.<sup>4</sup> The permittee is required to obtain storm water discharge permits and Water Quality Certifications pursuant to the Clean Water Act. Term T identifies explicitly individual prior appropriative rights issued by the Board.<sup>5</sup> Term 90 puts the Permittee on notice that during years of scarcity, water will not be available for diversion during a portion or all of the season authorized.<sup>6</sup>

<sup>3</sup> Term 43AP states that the Permittee shall install and maintain an outlet pipe of adequate capacity in each dam as near as practicable to the bottom of the natural stream channel in order that water entering the reservoirs which is not authorized for appropriation under this permit can be released. Before starting construction, permittee shall submit plans and specifications of the outlet pipes, or alternative facility, to the Chief of the Division of Water Rights for approval. Before storing water in the reservoirs, permittee shall furnish evidence which substantiates that the outlet pipes have been installed in each dam. Evidence shall include photographs showing completed works or certification by a registered Civil or Agricultural Engineer.

<sup>4</sup> Term J states that no construction shall be commenced and no water shall be used under this permit until all necessary federal, state and local approvals have been obtained.

<sup>5</sup> Term T states that this permit is specifically subject to the prior right of Solano County Water Agency under appropriation issued pursuant to Applications 12578 & 12716.

<sup>6</sup> Term 90 states that this permit is subject to prior rights. Permittee is put on notice that, during some years, water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that, in any year of water scarcity, the

#### 4.2 Balasek Application

As previously stated, based on the information provided by SCWA, the Balaseks agreed to reduce their diversion season to the period from January 1 to April 30. The Balaseks will be planting permanent crops of olives and grapes. Water may not be available during the Balaseks' diversion season in 25 percent of years. The Balaseks understand the probability of drought and have agreed to accept the risks to their crops should water not be available when the crops are first planted. Once established, plants such as olives and grapes can withstand drought although crop production will be diminished.

In accordance with the protest dismissal conditions outlined by SCWA and agreed to by Mr. Balasek on May 24, 2001, the Balaseks' permit will include Standard Permit Terms 43AP, 90, J and T. In light of the information presented in section 4.0, the following Special Permit Term will be added to the permit for Application 31054.

The Permittee may collect water to storage from January 1 through April 30 of each year unless the mean daily flow past the Putah Diversion Dam is insufficient to meet the flows required by Exhibit "A" of the Amended Judgment, Putah Creek Water Cases (Superior Court Sacramento County, [2000], No. 515766), as it may be amended by the court. Permittee may begin collecting water on January 1 of any year and may continue to divert unless notified by the Solano County Water Agency (or its successor) that the following rainfall totals, in inches, have not been received by February 1 of any given year at a minimum of two of the following three locations: Winters (5.5 inches), Lake Solano (5.8 inches), and Markley Cove (6.0 inches). Upon such notification, and for the remainder of that diversion season, Permittee may not collect water to storage pursuant to this Permit unless notified by Solano County Water Agency that such diversion is allowable, and under what conditions. The Permittee may, within 24 hours of notification to cease diversion, request from Solano County Water Agency, during normal business hours, copies of all release and flow measurements, all calculated mean daily releases and flows, and all observations required by the above-referenced Judgment, such information to be provided to Permittee within three business days.

#### 4.3 Outcome of protest resolution

SCWA agreed to withdraw its protests against Mr. Morgan's applications if the three conditions listed in section 2.1.3 are met and against the Balaseks' applications if those two conditions and the special permit term specified in section 4.2 are met. The applicants and the protestant reached agreement on the first two conditions, inclusion of the Special Permit Term for the Balasek application, and Permit Terms 43AP, 90, J and T for the Balasek and Morgan Applications. The permit terms appear to resolve SCWA's protest against the applications. The only outstanding issue involves agreement on the third condition: that the SWRCB staff makes a determination that Putah Creek, from the Solano Diversion Dam upstream to Monticello Dam, is fully appropriated. SCWA has not withdrawn its protests against Applications 29498, 29724,

---

season of diversion authorized herein may be reduced or completely eliminated by order of the SWRCB, made after notice to interested parties and opportunity for hearing.

29725 and 31054 because SCWA requested that the inter dam reach of Putah Creek be placed on the fully appropriated streams list year round for all water year types.

SCWA asks the Division to recommend that the stream reach be declared fully appropriated year-round because water is only available on an "infrequent basis," thus making enforcement of limited water right permits an issue. The SWRCB can make a declaration that a stream system is fully appropriated based on a previous water right decision that determines that no water remains available for appropriation. (Wat. Code § 1205 subd. (b)). The Division finds that the segment of Putah Creek between Solano Diversion Dam and Monticello Diversion Dam is fully appropriated between April 1 and December 15 in all water year types and year-round in dry water years. SCWA submitted no additional evidence to show that the stream segment is fully appropriated for the remainder of the time. Therefore, the Division is not inclined to make any recommendation that deviates from its findings regarding water availability. A Division Decision on specific applications to appropriate water is not the appropriate forum to make a policy determination regarding the fully appropriated streams Declaration. When it updates the fully appropriated streams Declaration, the SWRCB could pursue any of several options, two of which are discussed below, for listing this reach of Putah Creek.

One option the SWRCB may take in listing this reach of Putah Creek on the Declaration would be to list the season and year type where water is found to be unavailable. In this case, Division staff has found that no unappropriated water is available in Putah Creek, from the Solano Diversion Dam upstream to Monticello Dam, for the period of April 1 through December 15 in normal or dry water years and year-round in dry water years. Applications for water outside of the season specified as fully appropriated could be accepted and processed without the applicant meeting the requirements under Water Code section 1205, and California Code of Regulations, sections 871 through 874. When processing any application to appropriate water, the SWRCB may request additional information to demonstrate that water is available to serve the proposed project, (Wat. Code § 1275 subd. (a)), including whether water is available to serve the proposed use during all the relative time periods. The SWRCB has the authority to reject an application to appropriate a constant water supply if the applicant does not provide evidence of an alternative water supply for times when water is unavailable. The SWRCB may reject an application that would not best conserve the public interest, as may be the case if an applicant applies for a water right to serve a continuous use on a stream where water is available only part of the time. (Wat. Code § 1255.) Practical considerations, including limitations on the ability to apply and enforce permits terms that effectively prevent unauthorized diversions, may be considered in determining whether to issue a permit, even where permit terms may be proposed that theoretically could prevent violations.

Another option is to list the stream reach as fully appropriated year-round without further specifying hydraulic year-types where water may be available. This approach is similar to that taken by the SWRCB in listing additional months on the Declaration for the Mokelumne River, months where water was fully appropriated only in some years. (Based on a 65-year study, water was available 28 percent of the years in March; 17 percent of the years in April; 37 percent of the years in May; and 42 percent of the years in June.) (D 98-08 at 9.) In D 98-08, the SWRCB noted that allowing acceptance of future applications for projects that require water on an "infrequent basis" was too vague. Instead, the SWRCB opted to include the stream on the list

for all months, including the months where water was available on an infrequent basis. The designation contains a footnote that allows the Division to accept applications for conjunctive use projects that are not dependent on unappropriated water being available in most years. Evidence of water availability for conjunctive use projects would be evaluated in the processing of the application. By similar reasoning, the Declaration could list Putah Creek as fully appropriated year round, but with a footnote allowing the Division to accept applications for uses not dependent on water being available in most years.

How the SWRCB decides to list this reach of Putah Creek on the Declaration, as described above or otherwise, is outside the scope of this Decision. This Decision properly determines whether water is available for appropriation during the period when the applicants propose to divert water, and sets appropriate permit terms based on that determination. In so doing, this Decision makes a determination that water is unavailable for appropriation under specified conditions, which include all of the time during dry years. How that determination should be reflected in the Declaration should properly be decided during the next update of the declaration. It does not appear that enforcement is a problem for the two applicants at issue in this order, although it may be an issue with other applications not before us. SCWA should raise the "infrequent basis" and enforcement issue if and when another water right application is filed on this stream reach, or request the SWRCB to consider this policy argument when it updates the Declaration. (See Cal. Code of Regs., tit. 23, § 872 subd. (c) & (d).)

## 5.0 COMPLIANCE WITH CEQA

As the lead agency pursuant to CEQA, Division staff prepared and circulated an Initial Study and Negative Declaration in accordance with section 21064 of the Public Resources Code for Applications 29498, 29724 and 29725, and for Application 31054. On June 17, 2002, the Division staff circulated the draft Negative Declaration for public review and comment on Applications 29498, 29724 and 29725. Comments were received from the Central Valley Region Office of the Regional Water Quality Control Board (RWQCB), SCWA and the Department of Transportation (DOT). The RWQCB's comments were related to the need for a 401 Water Quality Certification, the Construction Activities Storm Water General Permit, and a Dewatering Permit. Permit Term J will be included in the permits to require the permittee to obtain all necessary state and federal approvals before construction begins. The DOT reviewed the proposed activities and found they will not significantly impact the State highway system. SCWA's comments were related to the water availability study. The Division considered the comments and based on the whole record finds that the mitigation measures contained in the Negative Declaration and incorporated into the permit issued pursuant to this decision will adequately reduce potential environmental effects to less than significant levels.

On June 10, 2002, the Division staff circulated the draft Negative Declaration for public review and comment on Application 31054. Comments were received from SCWA and DOT. The DOT reviewed the proposed activities and found that they will not significantly impact the State highway system. SCWA's comments were related to protest resolution and the water availability study. The Division considered the comments and based on the whole record finds that, with the inclusion of the Special Permit Term, and Terms 43AP, 90, J and T, approval of Applications

29498, 29724, 29725 and 31054 will not have significant environmental impacts. Prior to adopting this decision, the Division adopted the Negative Declarations for both Applications 29498, 29724 and 29725, and Application 31054.

## 6.0 SUMMARY AND CONCLUSIONS

The Division has evaluated and considered all available information concerning William I. Morgan Jr.'s and Kurt and Iria Balasek's water right applications, including water availability, the applicants' proposed diversion and use of water, senior water rights and fishery flows required for Lower Putah Creek, and Solano Dam release data submitted by SCWA. Based on a review of all available information, the Division concludes that there is water available for appropriation for the subject applications in some years and the proposed uses are compatible with an interruptible supply. The proposed diversions and uses of water are reasonable, beneficial, and in the public interest. Accordingly, water right permits should be issued to Mr. William I. Morgan for the diversion of 30 afa with the inclusion of the standard and special permit terms established in this decision. A water right permit should be issued to Kurt M. and Iria C. Balasek for the diversion of 45 afa to storage with the inclusion of the standard and special permit terms established in this decision.

## ORDER

The Division hereby ORDERS that Applications 29498, 29724, 29725 and 31054 are approved. The following permits (Attachment A) shall issue, subject to the applicants' compliance with the required fees under section 1540 of the Water Code:



*for* Harry M. Schueller  
Chief Deputy Director

DATE: 1/13/03